

1  
2  
3  
4  
5  
6  
7  
8 **IN THE UNITED STATES DISTRICT COURT FOR THE**  
9 **EASTERN DISTRICT OF CALIFORNIA**

10 **MELCHOR FLOREZ MIRAMONTES,** ) **CV F 03-04-5713 AWI**  
11 **Petitioner,** ) **(CR F 02-5190 AWI)**  
12 **v.** ) **ORDER DISMISSING**  
13 **UNITED STATES OF AMERICA,** ) **MOTION TO VACATE**  
14 **Respondent.** ) **JUDGMENT PURSUANT TO**  
15 **(28 U.S.C. § 2255)**  
16 **Document No. 96**

17  
18 Petitioner Melchor Florez Miramontes (“Petitioner”) was convicted on March 17, 2003,  
19 to one count of conspiracy to distribute methamphetamine in violation of 21 U.S.C., sections 846  
20 and 841(a)(1) by plea of guilty. He was sentenced on May 27, 2003, to a term of 235 months  
21 imprisonment. Petitioner timely filed a motion to vacate, modify or set aside the sentence  
22 pursuant to 28 U.S.C., section<sup>1</sup> 2255, on May 14, 2004. That motion, and Petitioner’s motion to  
23 amend his habeas petition were denied by the court in separate orders that were filed on October  
24 14, 2004. The docket indicates Petitioner filed a notice of appeal of the court’s order denying  
25 habeas relief on December 21, 2005. To the court’s knowledge, no certificate of appealability  
26 has been requested by petitioner. Nor has the Ninth Circuit Court of Appeals issued any order

27  
28 <sup>1</sup> References to section numbers hereinafter refer to sections of Title 28 of the United States Code unless otherwise specified.

1 with respect to Plaintiff's appeal as of the date of this writing. On June 6, 2006, Petitioner filed  
2 the instant motion to vacate the judgment pursuant to Rule 60(b) of the Federal Rules of Civil  
3 Procedure. For the reasons that follow that motion will be denied.

4 Plaintiff's motion pursuant to Rule 60(b) requests the court reconsider and vacate its prior  
5 judgment with regard to Petitioner's habeas claim of ineffective assistance of counsel. In its  
6 order denying habeas relief, the court held Plaintiff did not suffer ineffective assistance when his  
7 attorney did not object to the search and seizure of narcotics that occurred in connection with his  
8 arrest. As best the court can determine from Petitioner's pleading, the crux of his argument is  
9 that the court was erroneous when it failed to allow Petitioner the opportunity to fully develop  
10 his argument that he was out of his car at the time of his arrest and that the search of his car was  
11 conducted prior to his arrest. Petitioner claims that since the search was not incidental to his  
12 arrest, the search was unlawful, and he suffered prejudice as a result of his attorney's failure to  
13 challenge the search. The court addressed the legality of the search in its decision dismissing  
14 Petitioner's motion for habeas relief, and found the search was supported by probable cause, in  
15 addition to being incidental to Petitioner's arrest. Doc. # 67 at 6-7.

16 Here, it is plain that the factual basis for Petitioner's Rule 60(b) motion states a claim for  
17 habeas relief identical to the ground already raised by Petitioner in his motion pursuant to section  
18 2255 filed May 14, 2004. As such, Plaintiff's instant claim for relief pursuant to Rule 60(b) also  
19 states a claim for successive habeas relief.

20 Ninth Circuit law pertaining to the use of Rule 60(b) as a means of presenting claims that  
21 would otherwise state a successive claim under section 2255 is well settled. Where "the factual  
22 predicate for a Rule 60(b) motion also states a claim for a successive petition under 28 U.S.C. §  
23 2244(b), [ . . . ], the Rule 60(b) motion should be treated as a successive habeas petition."  
24 Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998). "Congress has established  
25 mandatory, jurisdictional procedures a petitioner must follow in appealing from a district court's  
26 denial of relief under § 2255. [A petitioner] cannot avoid these jurisdictional limitations by  
27  
28

1 styling his motion under another name.” United States v. Christensen, 119 Fed.Appx. 884, 887  
2 (9th Cir. 2004) (denying Rule 60(b) motion where petitioner did not obtain a certificate of  
3 appealability).

4 Because Petitioner’s claims states a claim under section 2255, the court is required to  
5 consider Petitioner’s Rule 60(b) motion as a successive motion under section 2255. See Ortiz v.  
6 Stewart, 195 F.3d 520, 520 (9th Cir. 1999) (ineffective assistance claim raised under Rule 60(b)  
7 motion construed as successive section 2255 habeas petition where issue was raised in first  
8 habeas petition). Because the court construes Petitioner’s motion under Rule 60(b) as a  
9 successive habeas petition pursuant to section 2255, Petitioner’s ability to raise the substantive  
10 underlying claims is delimited by those provisions of the Antiterrorism and Effective Death  
11 Penalty Act (“AEDPA”) that apply to habeas petitions generally and to successive motions under  
12 section 2255 in particular.

13 Section 2255 requires that:

14 “[a] second or successive motion must be certified as provided in section 2244 by  
15 a panel of the appropriate court of appeals to contain –

16 (1) newly discovered evidence that, if proven and viewed in light  
17 of the evidence as a whole, would be sufficient to establish by clear  
and convincing evidence that no reasonable fact finder would have  
found the movant guilty of the offence; or

18 (2) a new rule of constitutional law, made retroactive to cases on  
19 collateral review by the Supreme Court, that was previously  
unavailable.

20 Section 2244, subdivision (b)(3) provides that a second or successive habeas petition is  
21 not allowed unless the appellate court issues an order authorizing the district court to consider the  
22 second or successive petition. A district court must dismiss any second or successive habeas  
23 claims where the conditions set forth in section 2244 are not met. See United States v. Allen,  
24 157 F.3d 661, 664 (9 Cir. 1998) (district court lacks jurisdiction to consider successive motion  
25 pursuant to section 2255 where certification requirement of section 2244 (b) has not been met).  
26 Petitioner does not allege, and the court can find no evidence that Petitioner has sought, or that  
27

1 the appellate court has granted, any order authorizing this court to give consideration to  
2 Plaintiff's successive habeas petition. This court must therefore conclude it lacks jurisdiction to  
3 consider Plaintiff's motion for relief.

4  
5 THEREFORE, it is hereby ORDERED that Petitioner's motion pursuant to Rule 60(b) is  
6 deemed a second or successive motion pursuant to section 2255 and is DENIED for the reasons  
7 discussed above.

8  
9  
10  
11 IT IS SO ORDERED.

12 **Dated: January 23, 2007**  
13 0m8i78

/s/ Anthony W. Ishii  
UNITED STATES DISTRICT JUDGE